

Message Text

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PAGE 01 STATE 019591
ORIGIN EB-08

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R 280155Z JAN 77
FM SECSTATE WASHDC
TO AMEMBASSY LISBON
AMCONSUL PONTA DELGADA
COMUSFORAZ LAJES AFB

C O N F I D E N T I A L STATE 019591

E.O. 11652: GDS

TAGS: EAIR, PO

SUBJECT: CIVAIR - USE OF LAJES AB BY CIVIL AIRCRAFT

REF : (A) USDAO LISBON 151605Z JULY; (B) LISBON 2576;
(C) LISBON 4962; (D) LISBON 6963; (E) STATE 182807;
(F) LISBON 263
(F) LISBON 263

CONFIDENTIAL

CONFIDENTIAL

PAGE 02 STATE 019591

1. DEPT BELIEVES THERE ARE NO LEGAL GROUNDS FOR
CONCLUSION THAT TWA USE OF LAJES WOULD IN ITSELF OPEN
BASE TO USE BY THIRD COUNTRY AIRCRAFT. ON ASSUMPTION

"FOREIGN CIVIL AIR TRAFFIC" CITED USDAO MESSAGE MEANS
"THIRD COUNTRY CIVIL AIR TRAFFIC", THIS SHOULD REMOVE
PORTUGUESE OBJECTION.

2. REQUEST EMBASSY MAKE FOLLOWING ARGUMENT AT APPROPRIATE
LEVEL, DR. PEQUITO OR HIGHER:

A. PRINCIPAL ARTICLES OF CHICAGO CONVENTION GOVERNING
ACCESS TO AIRPORTS ARE 15 AND 68, TO BE READ IN CONJUNCTION.
FIRST SENTENCE OF ARTICLE 15 PROVIDES, "EVERY AIRPORT
IN A CONTRACTING STATE WHICH IS OPEN TO PUBLIC USE BY
ITS NATIONAL AIRCRAFT SHALL LIKEWISE, SUBJECT TO THE
PROVISIONS OF ARTICLE 68, BE OPEN UNDER UNIFORM CONDITIONS
TO THE AIRCRAFT OF ALL THE OTHER CONTRACTING STATES."
ARTICLE 68 IN TURN PROVIDES: "EACH CONTRACTING STATE
MAY, SUBJECT TO THE PROVISIONS OF THIS CONVENTION,
DESIGNATE THE ROUTE TO BE FOLLOWED WITHIN ITS TERRITORY
BY ANY INTERNATIONAL AIR SERVICE AND THE AIRPORTS WHICH
ANY SUCH SERVICE MAY USE." ARTICLE 96 DEFINES "INTERNA-
TIONAL AIR SERVICE" TO MEAN SCHEDULED SERVICE FOR
TRANSPORT OF PASSENGERS, MAIL OR CARGO. THUS THE
OBLIGATION OF A STATE TO OPEN AN AIRPORT TO PUBLIC USE
IS SUBJECT TO THAT STATE'S RIGHT TO ESTABLISH UNIFORM
CONDITIONS, AND ITS FURTHER RIGHT TO DESIGNATE WHICH
AIRPORTS ANY GIVEN SCHEDULED INTERNATIONAL SERVICE MAY
USE.

B. NEITHER ARTICLE 5 OF THE CHICAGO CONVENTION NOR
ARTICLE 1 OF THE INTERNATIONAL AIR SERVICES TRANSIT
CONFIDENTIAL

CONFIDENTIAL

PAGE 03 STATE 019591

AGREEMENT (IASTA) CHANGES THIS CONCLUSION. ARTICLE 5
OF CHICAGO EXCHANGES AMONG CONTRACTING STATES THE RIGHT
OF AIRCRAFT NOT IN SCHEDULED INTERNATIONAL SERVICES TO
MAKE NON-TRAFFIC STOPS WITHOUT PRIOR PERMISSION. THE
OBLIGATION TO ALLOW SUCH STOPS CREATED BY THIS ARTICLE
IS NOT QUALIFIED BY ARTICLE 68, WHICH ADDRESSES ONLY
SCHEDULED SERVICES; BUT NEITHER DOES THE RIGHT TO MAKE
NON-TRAFFIC STOPS IMPLY THE RIGHT TO USE A PARTICULAR
AIRPORT. SIMILARLY, THE RIGHT OF SCHEDULED SERVICES TO
LAND FOR NON-TRAFFIC PURPOSES CONFERRED BY ARTICLE I,
SECTION 1, PARAGRAPH 2 OF THE IASTA DOES NOT IMPLY THE
RIGHT TO USE A PARTICULAR AIRPORT. SECTION 4 OF ARTICLE I
OF IASTA REAFFIRMS THE RIGHT OF STATES TO DESIGNATE
AIRPORTS FOR SCHEDULED INTERNATIONAL SERVICES. THUS
NEITHER ARTICLE 5 OF CHICAGO NOR ARTICLE I OF IASTA
ENTITLES AN INTERNATIONAL SERVICE, SCHEDULED OR NON-
SCHEDULED, TO USE A GIVEN AIRPORT. ARTICLE 15 OF
CHICAGO, AS LIMITED BY ARTICLE 68, IS THE SOLE PROVISION
DEFINING THAT RIGHT.

C. LAJES IS CURRENTLY OPEN TO PUBLIC USE BY PORTUGUESE NATIONAL AIRCRAFT, AND THUS ARTICLE 15 REQUIRES THAT IT BE OPEN TO AIRCRAFT OF OTHER CONTRACTING STATES UNDER UNIFORM CONDITIONS. IF THE UNIFORM CONDITION WERE THAT LAJES IS OPEN ONLY FOR TRAFFIC STOPS, FOLLOWING WOULD BE SITUATION:

(1) ARTICLE 5 OF CHICAGO CONFERS NO RIGHT ON NON-COMMERCIAL FLIGHTS TO MAKE TRAFFIC STOPS, AND STATES ROUTINELY REFUSE PERMISSION TO MAKE SUCH STOPS WHEN THEY WISH TO DO SO.

(2) THE ARTICLE DOES CONFER SUCH A RIGHT ON COMMERCIAL NONSCHEDULED FLIGHTS, BUT IMMEDIATELY GIVES THE HOST

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PAGE 04 STATE 019591

STATE THE RIGHT "TO IMPOSE SUCH REGULATIONS, CONDITIONS OR LIMITATIONS AS IT MAY CONSIDER DESIRABLE ON FLIGHTS MAKING SUCH TRAFFIC STOPS." IN PRACTICE SUCH FLIGHTS MUST, AND DO, SEEK INDIVIDUAL PERMISSION FOR EACH SUCH STOP, AND PERMISSION IS FREQUENTLY REFUSED.

(3) GOP WOULD HAVE THE RIGHT UNDER ARTICLE 68 TO DESIGNATE SANTA MARIA FOR ANY SCHEDULED SERVICE, WHETHER TRAFFIC OR TRANSIT, WHICH IT DID NOT WANT TO USE LAJES, UNLESS RIGHTS TO LAJES HAD BEEN SPECIFICALLY GIVEN THROUGH BILATERAL AGREEMENT. IN PARTICULAR, SOVIET AND CUBAN RIGHTS TO AZORES ARE NOT RIGHTS TO LAJES AS LONG AS ANOTHER AIRPORT IS AVAILABLE IN THE AZORES, PROVIDED THAT THE PORTUGUESE DO NOT USE LAJES AS THE AZORES POINT ON A RECIPROCALLY GRANTED ROUTE. (OBVIOUSLY, IF THE PORTUGUESE FLEW OUT OF LAJES TO IMPLEMENT AN AZORES-MOSCOW ROUTE GRANTED BY THE USSR, THE SOVIETS COULD RIGHTLY CLAIM THAT THE PORTUGUESE HAD INTERPRETED "AZORES" TO MEAN "LAJES" AND COULD NOT INTERPRET IT DIFFERENTLY FOR THE SOVIETS' MOSCOW-AZORES-LATIN AMERICA ROUTE GRANTED IN RETURN, ABSENT SPECIFIC LANGUAGE OR CLEAR EVIDENCE OF DRAFTERS' INTENT TO THIS EFFECT. THE U.S. RIGHT TO LAJES IS DERIVED FROM SUCH A SITUATION.) THE RIGHT UNDER ARTICLE 68 WOULD EXIST WHETHER OR NOT THERE WERE ANY CONDITIONS ON THE USE OF LAJES.

(4) THUS, GOP WOULD RETAIN FULL CONTROL OVER FOREIGN USE OF LAJES.

D. USG RECOMMENDS THIS POSITION TO GOP AS CONSISTENT

WITH LANGUAGE OF CONVENTIONS, WHICH CLEARLY WERE NOT
INTENDED TO CONFER RIGHTS TO SPECIFIC AIRPORTS FOR
SCHEDULED SERVICES. FURTHERMORE, AVAILABILITY OF SANTA
MARIA AS FUNCTIONALLY EQUIVALENT ALTERNATIVE DEFEATS
ANY ARGUMENT THAT FORBIDDING LAJES TO NONSCHEDULED
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PAGE 05 STATE 019591

SERVICES UNDERMINES TRANSIT RIGHTS INTENDED BY CONVENTIONS.

E. IN SUM, THERE IS NO LEGAL REASON WHY ALLOWING TWA
TO EXERCISE THE U.S. RIGHTS UNDER THE BILATERAL AT
LAJES WOULD PREJUDICE EFFORTS TO KEEP THIRD COUNTRY
AIRCRAFT OUT OF THAT AIRPORT. THE LEGAL POSITION SET
FORTH IN PARAS A-D SHOULD ALLOW THE GOP TO SUCCESSFULLY
ARGUE ITS RIGHT TO EXCLUDE ALL THIRD COUNTRY AIRCRAFT,
INCLUDING THOSE NOT IN SCHEDULED SERVICE, PROVIDED IT
IMPOSES THE UNIFORM CONDITION DESCRIBED ABOVE, AND THE
PROXIMITY OF SANTA MARIA PROVIDES ADDITIONAL PRACTICAL
JUSTIFICATION FOR SUCH A COURSE. IF THE LIMITED
COMMERCIAL USE OF LAJES ENVISAGED HERE IS THOUGHT TO
THREATEN NORMAL MILITARY OPERATIONS, THE GOVERNMENT OF
PORTUGAL IS OF COURSE FREE TO CLOSE LAJES TO ALL CIVIL
AIR OPERATIONS UNDER THE BILATERAL, INCLUDING THOSE OF
PORTUGAL.

3. SUGGEST, SUBJECT EMBASSY CONCURRENCE, THAT FORMAL
NOTE ALONG SAME LINES WOULD BE USEFUL.

4. OFFICIALS AT CAB, WHICH CAN INDEPENDENTLY INSTITUTE
FORMAL PROCEEDING TO CONSIDER BANNING TAP FLIGHTS FROM
LAJES TO THE U.S. ARE THINKING SERIOUSLY OF DOING SO IF
PORTUGUESE DO NOT RESPOND QUICKLY AND FAVORABLY TO
APPROACH ABOVE. YOU MAY WISH TO MENTION THIS TO THEM.

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